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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JENO DONTE BREWER,

Defendant and Appellant.

B207859

(Los Angeles County
Super. Ct. No. BA309601)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Patricia J. Titus, Judge. Reversed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Jeno Donte Brewer appeals from the judgment following his convictions by a jury of forcible rape, forcible oral copulation, sexual penetration by a foreign object, and kidnapping to commit rape. He contends the court erred in admitting irrelevant expert testimony regarding child sexual abuse accommodation syndrome and rape trauma syndrome, and further erred in admitting evidence of prior sexual assaults as propensity evidence pursuant to Evidence Code section 1108. He also contends the court violated his Sixth Amendment right of confrontation by admitting testimony regarding the sexual assault examination and report from a person who had neither conducted the exam nor prepared the report. Finally, he contends prosecutorial misconduct in closing argument violated his right to due process. We conclude that the admission of evidence and other errors with respect to one of the uncharged sex offenses resulted in prejudicial error and accordingly reverse.

BACKGROUND

Identity was not a contested issue and Brewer admitted that the sexual acts occurred. His defense was that he honestly and reasonably believed that S.S. was 19 years old and that she had consented.

The Sex Acts

S.S. was 14 years old and a ninth grade student. On September 5, 2006, as she walked home from school on Van Ness Boulevard, wearing jeans and a T-shirt, her hair in extensions, and carrying a book bag, Brewer drove up in a large black car. She thought it looked like either a Cadillac or a Lincoln Town Car. Brewer called out to her and motioned for her to come over. This was not the first time a man had called out to her while walking down the street. She walked over to the car and spoke to Brewer through the open passenger side window.

Brewer asked S.S. her name and she told him her middle name. He asked for her hand and, while holding it, recited a poem about a beautiful African queen. He asked S.S. for her telephone number and she gave him her cell phone number. She saw that

his car was blocking traffic and told Brewer to pull his car around the corner onto Venice Boulevard so they could continue talking.

Brewer told her that he wanted to take her shopping, buy her nice things, and take her to have her hair and nails done. She wanted what Brewer was offering so she continued to talk to him. Brewer said he was 27 years old. S.S. told him she was 14.

S.S. decided to get into the car to continue their conversation. As Brewer drove he asked her if she had a boyfriend and she told him that it did not matter. He asked her if she had had sex, if she had ever had sex with a girl, if she had ever had oral sex, or masturbated. She told him that she had done none of these things. They held hands in the car and Brewer asked her if she wanted him to drop her off somewhere. She said no, that she wanted to drive around with him.

When Brewer kissed her hand she became uncomfortable and snatched it away. He took her hand again and placed it on his erect penis and told her to masturbate him. He put lotion on his penis and showed her how he wanted her to do it. She was afraid. She did not want to touch his penis and thought it was “weird” that a grown man she did not know would show her his penis. She felt that she had no choice whether to masturbate him because when she protested and told him “no” he ignored her and his voice became stronger. She rubbed his penis in order to avoid doing anything more sexual.

Brewer stopped his car behind a Ralph’s market where they kissed. He told her that he needed to go to a gas station because the car was about to run out of gas and asked her to walk with him. She declined and waited for him in the car until he returned. While he was gone she did not try to leave or to seek assistance from workers she observed unloading a truck at the Ralphs market. Although S.S. was scared, she did not want Brewer to get in trouble and decided to wait for him to return.

Brewer returned with a can of gasoline and attempted unsuccessfully to pour the gasoline into the gas tank. He drove to a gas station and then to an auto parts store where he purchased a funnel to pour the gasoline into the tank. At each of these stops

she remained waiting in the car and did not try to leave or to seek anyone's help. S.S. explained that she did not feel as though she was "in deep trouble at that point" and that she still wanted to be with Brewer.

He drove into a private area and Brewer told her to remove her pants so he could feel and touch her genital area. He digitally penetrated her vagina. She told him to stop, that it was painful, and that he was hurting her. He again exposed his penis and now told her to orally copulate him. She told him "no." He became frustrated and upset and pushed her head toward his penis. He said that if she was his girlfriend then she was going to do as he said. She put her mouth on his penis and did as he told her although she kept stopping. She told him perhaps they could do this some other time but that she now needed to get home because it was late and her mother would get mad at her. She asked to go home at least two more times. She did not want to orally copulate Brewer so she gagged and choked and pretended that she was going to throw up. He pulled the car to the side of the road because he did not want her to throw up in the car. When he stopped the car, she thought about running away but her pants had been pulled down and she felt she could not get out of the car with her pants down. She asked Brewer if she could pull up her pants and he told her no, not yet.

Brewer drove to a park, stopped the car, and told S.S. to get into the backseat. She complied but started crying as he removed one of her pant legs. She told him that she did not want to do this. In response, he told her to be quiet because people might hear her. She asked him to take her home and he said he would as soon as they were finished. Brewer told her not to worry, that he would not have intercourse with her but wanted to rub his penis against her. He got on top of her and she felt the pressure of his penis pushing on the outside part of her vagina. It felt as though his penis was about to enter her vagina and it was painful. When she was able to get up she saw sperm on the car's backseat.

They got dressed and returned to the front seat. Although she had a cell phone she did not think to use it. Brewer dropped her off in the area where they first met. While driving he told her not to tell anyone about what had just transpired between them and she promised not to tell. He asked her if she was willing to work selling for him. He explained that she would work only two days a week and that he would give her money to buy lingerie and to get her hair done. She understood his comments to mean prostitution. Brewer said he loved her and wanted to marry her and asked her if she loved him too. She said yes to everything Brewer asked because she had no intention of telling anyone what had happened between them.

At trial, S.S. acknowledged that she got into the car and drove around with Brewer because of all the things he had offered to buy for her. She stopped wanting to be with him, however, once he forced her to orally copulate him. Even after the incident she still wanted to be Brewer's girlfriend because there was no other way that she could get the nice things he had offered.

After Brewer dropped her off, she walked to her cousins' house. When she entered the house, she was crying so much that her cousins could not understand her, but she finally told them what happened and they convinced her to report the incident to the police. S.S. was reluctant to contact the police because she did not want to get in trouble and felt responsible for getting into the car. She was also concerned Brewer would claim that she liked it because she had pretended to enjoy their sexual activities in the backseat of the car.

The police took S.S. to the Rape Treatment Center at UCLA Hospital in Santa Monica where a nurse practitioner conducted a sexual assault examination.

Two days later S.S. was in a Payless ShoeSource store with her sister when she saw Brewer enter. She ran crying to her sister and said, "That's him." Her sister asked one of the store employees to hide S.S. in the back of the store and to call 911. S.S.'s sister called 911 and their mother.

Brewer was speaking with a man in the parking lot when S.S.'s mother arrived. S.S.'s sister pointed Brewer out and S.S.'s mother walked over to Brewer and asked, ““did you touch my daughter[?]”” The man said that Brewer was being accused of raping S.S. Brewer denied raping anyone and ran away. Police arrived but did not apprehend Brewer.

S.S.'s sister testified that S.S. had a reputation in the family for honesty and described her as quiet, shy, and not a troublemaker. She explained that their mother was strict, old-fashioned, and did not have a lot of money. Because their mother was so frugal, S.S.'s sister testified that she would not be surprised to learn that S.S. got into someone's car because he had offered to buy her nice things and to get her hair and nails done, but would be surprised to learn that S.S. wanted to be the girlfriend of someone she had only known for an hour.

S.S.'s cousin testified that S.S. came to her house on September 5, 2006, crying and upset. At first S.S. refused to tell her what had happened but eventually said that she had gotten into a car with a man who forced her to have sex with him. S.S. did not have a reputation in the family for lying. She took S.S. to the police station to report the incident.

Nearly a year later, on October 26, 2007, the cousin received a telephone call from Brewer from jail. The tape recorded call was played for the jury at trial. Brewer said that he was a good person, had a great love for Black women, and was not a rapist. He told her that he did not know S.S.'s age and that he “didn't do nothin' to her[.]” Brewer told her that he was a “handsome[,], charming[,], charismatic person and [he did not] have to take nothing from a woman and [he] wouldn't do that.”

Sexual Assault Exam

Dr. Elliot Schulman was the director of the Public Health Department in Santa Barbara as well as the medical director of the Rape Treatment Center at UCLA Hospital in Santa Monica. He reviewed the 30-page report of S.S.'s sexual assault examination

prepared by a nurse practitioner.¹ The written report consisted of three parts: S.S.'s personal information and medical history; her description of the sexual assault; and the physical examination. Part of the physical examination was recorded on a DVD using an instrument called a colposcope to record images of the interior of her vagina and this DVD was shown to the jury at trial. While viewing the DVD with the jury Dr. Schulman explained that the photos showed that she had an abrasion of the posterior fourchette and an abrasion at the entrance to the vagina. These injuries, he testified, showed that penetration occurred because they were located well beyond the opening of the vaginal tract itself. Dr. Schulman testified that she had also reported tenderness on her hymen. He stated that the injury to the posterior fourchette was consistent with blunt force trauma, but that he could not determine whether any of the injuries were from consensual or nonconsensual sexual activity.

Evidence collected during the examination included S.S.'s T-shirt, jeans and underwear, and nine swabs and seven slides of possible saliva, semen and pubic hair.

DNA Evidence and Brewer's Arrest

A senior criminalist at the California Department of Justice analyzed three pieces of evidence collected during S.S.'s sexual assault examination: a vaginal swab, an external genital swab, and S.S.'s buccal DNA reference swab. The criminalist found sperm in the external genital swab and the DNA profile of the sperm was a "cold hit" match for Brewer's DNA profile as recorded in the combined DNA index system.

On September 21, 2006, officers attempted to arrest Brewer but he ran away and escaped capture. Police apprehended him on October 19, 2006. After his arrest officers interviewed him at the station and the taped interview was played for the jury at trial.

¹ Brewer objected to the doctor's testimony as hearsay. The court overruled the objection noting that the testimony was hearsay but ruled that the evidence was admissible under the business records exception (Evid. Code, § 1271). Brewer did not object on the ground that the doctor's testimony violated his Sixth Amendment right of confrontation.

Throughout the interview Brewer repeated that he was not a rapist but avoided answering any of the officers' questions.

An analyst from Orchid Cellmark analyzed an external genital swab collected during S.S.'s sexual assault examination and compared the DNA profile of the sperm found on the swab to a reference DNA sample taken from Brewer after his arrest. The Cellmark analyst concluded that the DNA profile of the semen found on the external genital swab matched Brewer's DNA profile.

Evidence of Prior Assaults

In the evening of July 13, 1997, M.K. was in bed watching television when she saw Brewer standing in her bedroom doorway. He got on top of her and pinned her to the bed. He tried to take her shirt off and she "started screaming her head off." She was convinced that she was about to be raped. They struggled violently and her body became wedged into the narrow space between her bed and the wall. He put his hands around her neck and began strangling her. M.K. continued screaming, he told her to "shut up," and put his fist into her mouth. She bit down as hard as she could and, because she bit into fabric, thought that perhaps he had on gloves. She was biting so hard she almost dislodged her molars, the skin around her mouth tore open, and she started bleeding. Brewer got up and grabbed her purse as he left her apartment. When he stood up she looked closely at him and was surprised to see how young he was. Apparently M.K.'s neighbors heard her screams and several called 911.

Officers took M.K. to a rape treatment center for an examination. She had a black eye, bruises on her neck, and scrapes and scratches on her torso. Police collected physical evidence from her apartment, including her bed linens. The prosecutor who tried the earlier case testified that the blood evidence from M.K.'s clothing and linens was not sent to the crime lab for DNA analysis because M.K. believed that the blood was hers, and because there was no evidence that her attacker had been bleeding.

M.K. identified a photograph of Brewer as her attacker from a photo array. On the photo array she wrote, "Looks close. Same complexion, facial features, lips, nose,

eyes and shape of face.”” She also selected Brewer from a live line up, stating that he ““looks somewhat like my attacker. He had the right physique, but at the time no facial hair and he was wearing a hat.””

In the evening of August 6, 1997, C.C. was home alone working on a classroom project. She heard a noise and could see an object coming over the top of her head and then felt it choking her. She was shocked. She realized that the object was one of her husband’s ties. She struggled to remove the tie and a body jumped on top of her from behind. The man told her to be quiet, to give him what he wanted and then he would leave her alone, but if she did not then he would kill her. She tried to get up and the two struggled as C.C. “yelled” at him. The man slammed her head into the table to try to get her to be quiet and told her repeatedly to give him what he wanted. She thought the man wanted to rape her because he kept trying to pull her pants down. She saw that he wore socks on his hands and, during the struggle, the man put his sock-covered hand into her mouth and she could feel the skin around her mouth tearing. C.C. saw the apartment manager through the sliding glass door and screamed to her for help. Police arrived and apparently the man ran away before he could be apprehended. C.C. never saw her attacker’s face and identified no one as the perpetrator.

The prosecutor asked C.C. if she recalled why she never went to a lineup or looked at any photo arrays. She replied “The reason I was told is because the apartment manager --” before defense counsel made a hearsay objection. The court sustained the objection and granted defense counsel’s motion to strike.

Criminal charges were brought against Brewer based on the incidents involving M.K. and C.C. which were tried together. The court told the jury, based on judicial notice, that with respect to the charges involving M.K., the jury hung 11 to 1 in favor of guilt and, with respect to the charges involving C.C., that the jury hung 10 to 2 in favor of guilt.

Expert Testimony

Michael Hertica, a former police officer, was a marriage and family therapist with extensive clinical and research experience with sexual abuse involving children and adolescents. He had no knowledge of the facts of the present case and had not spoken to any of the parties or witnesses.

He testified to the general attributes of child sexual abuse accommodation syndrome as involving a five-step process: First, there is sexual abuse and a direct or implied threat to the victim to keep the abuse secret. The second step is the victim's sense of helplessness, or an inability to do anything about the abuse. The third step is accommodation, where the victim finds a way to live despite the abuse. The fourth step is a delayed or unconvincing disclosure. The last step is retraction, when the victim recants because of the pressures placed on the child after disclosure of the abuse.

Hertica testified that child sexual abuse accommodation syndrome is most often seen in instances of abuse by a family member, or by an adult in a position of trust, and that it is rarely seen in situations involving a minor and an adult stranger.

Hertica also testified to the general characteristics of rape trauma syndrome, which he described as a subset of posttraumatic stress disorder. Typical symptoms of the disorder include, anxiety, sexual dysfunction, sleep disturbance, and impaired peer relationships. How these symptoms may manifest, and the duration of the symptoms, depend in large part on the person's life experiences.²

Hertica stated that adolescents sometimes engage in risky behavior and occasionally make bad decisions because they are insufficiently mature to consistently

² In closing argument, the prosecutor conceded that the expert testimony regarding child sexual abuse accommodation syndrome and rape trauma syndrome was inapplicable. The prosecutor argued that "[y]ou heard Mike Hertica talk about and [defense counsel] cross-examine at length, normally, most people don't disclose right away. They keep it quiet, and it's secret. This is a case where it wasn't that way. As [defense counsel] correctly elicited on cross-examination, it's probably because it was a stranger case and wasn't [an] intra-familial situation where there was all those fears present in the home and pressures from the home." The Attorney General concedes that the expert testimony regarding the syndromes was irrelevant. (See *post.*)

exercise good judgment. He explained that typical developmental behaviors of an adolescent are to attempt to prove that they are in control, that they can make good decisions, and are responsible enough to act on those decisions with the goal of gaining independence from their family. The expert testified in general terms and did not discuss how any of these behaviors or syndromes may have related to this case.

Defense – Character Witnesses

Jenai Harris had known Brewer since 2004. She was a casting director, casting models for music videos, commercials, and fashion shows. Brewer, or Saddiq Mo as she knew him, assisted her in photo shoots with the models' outfits and helped to promote various events. He acted as a business partner and once arranged a photo shoot at his own home. He never made unwanted sexual advances when dealing with the models, and had always acted appropriately with her and her young child, including on the two or three occasions that he spent the night in her house.

She knew that his girlfriend had a business involving aromatherapy, but did not know whether Brewer was responsible for placing the products into stores. Harris once went to a horse ranch or farm where Brewer brought at-risk youths to ride horses. She did not see him engage in any inappropriate sexual activity with any of the children.

Jihad Abdus-Shakoor had known Brewer for 13 years and knew him as Saddiq Mo. They worked together for approximately a year and a half in Abdus-Shakoor's real estate business. Brewer left the real estate business to publish and promote his poetry which he used to generate funds for his nonprofit organization benefitting at-risk youth. He had never seen Brewer make any inappropriate sexual advances toward anyone.

Monique Robertson had known Brewer by the name Saddiq Mo for approximately five years. She had seen him interact with children, never saw him act inappropriately, and never observed him to have any sexual interest in children.

Corrine Paige operated the Q-Up horse-riding stable which offered therapeutic horseback riding for at-risk and handicapped children. She had an arrangement for Brewer to bring children to the stable to ride horses. She never observed, or heard

reports of, him acting inappropriately with any of the children. Paige admitted that she had been convicted of welfare fraud in the 1970's but did not believe that this conviction affected her credibility.

Brewer's Testimony

On September 5, 2006, at approximately 3:40 p.m. he was on his way to check on sales of aromatherapy products he had placed at a wig store in the mid-town area of Los Angeles. He was driving near Venice and Van Ness Boulevards when an attractive young female walking down the street attracted his attention. He saw that she had "a certain vivaciousness," had "nice curves on her body," and "nice braids." He also saw a certain assertiveness, or maturity, about her when she walked. She walked with her body erect, with her breasts and buttocks out, in an assertive manner. He noticed that she had on extremely form fitting jeans and a "baby doll" green T-shirt which clung tightly to her torso in a way he considered provocative. He thought that she was no older than 21 and was most likely a teenager. He wanted to share one of his poems with her.

He rolled down the car's windows and called out to her to come over. She did, and he recited a poem entitled Dedicated Lady he considered so uplifting that he intended to recite it at his grandmother's funeral the following week.

She asked if she could get into his car. Before she got in, she looked around as if she was looking for someone and he asked if she was concerned about a boyfriend. He wanted to ask for her telephone number, but did not want to get involved with her if she had a boyfriend or was married. She told him that it did not matter. She gave him her number and Brewer gave her two business cards: one for his aromatherapy business and one for his publishing business.

Brewer said that he was 30 years old and asked her age. She asked, "how old do I look?" and told him that she was "almost 19" and a student at Santa Monica Junior College. They talked about the classes she was taking and he asked whether she would be interested in selling his aromatherapy products and perhaps his poems.

He drove toward the wig shop and on the way he told her about his grandmother and her upcoming funeral. They held hands for a few seconds and he told her how happy he was to have met her.

Brewer parked the car because it was about to run out of gas. He asked her to walk with him to the gas station but she preferred to stay in the car and listen to music on the radio. He left the keys in the car's ignition and walked to the gas station. He returned with some gasoline but was unable to get the gasoline from the can into the gas tank without a funnel. He drove to a gas station and from there to an AutoZone store where he purchased a funnel. At each of these stops, she remained in the car and each time he left the keys in the car's ignition. When he returned from the AutoZone store she was "vivacious[]," and displayed "a real lively energy." They kissed, hugged, and touched each other and she made it clear that she wanted to be with him. He reclined the car's seat and asked her to lie on top of him. While caressing her buttocks he realized she was not wearing panties and she explained that she had on a G-string. He rubbed her vagina and between her legs over her clothing. He asked her what time she needed to be home and she told him 5 p.m.

He drove to another location and continued to rub her vagina while driving. He asked her to hold his erect penis and she grabbed it. He said that she really had gotten his "juices flowing," that he wanted to make love to her, and asked her if she was ready. She just smiled and laughed. He said that he wanted to lick her entire body from head to toe and she smiled. She asked if he had a place nearby and he responded that his place was too far away and that they had too little time together before she had to go home.

He drove to a park and parked the car in a secluded area. He pulled his pants off and told her to take her pants off as well. They kissed and he told her he wanted her to masturbate him, which she did. He fondled her vagina, noticed a few spots of blood in her G-string, and asked if she was okay. He offered to drop her off somewhere but she said she was fine.

They got into the backseat of the car and masturbated each other. He put saliva on his fingers and digitally penetrated her vagina. He got on top of her and rubbed his penis against her vagina until he ejaculated. He asked her how she felt and she said fine. He masturbated her some more and then “stuffed” his hand into her vagina. He asked how she liked it and she did not respond. He never inserted his penis into her vagina.

While driving home he told her that his business partner would contact her about selling aromatherapy products. When he explained that his business partner was his fiancée she frowned. She asked him to drop her off at the same place where they first met. He asked her to call to let him know that she had made it home safely and she said she would.

Two days later Brewer walked into a Payless ShoeSource store near Venice Boulevard. After leaving the store he met a friend in the parking lot who told him that a woman was accusing him of having raped her 14-year-old sister. He denied raping anyone. People started to gather around them in the parking lot as they spoke. He noticed a woman running toward him who appeared very angry and he ran away.

He admitted running away from police several times and explained that he intended to turn himself in but first wanted to make arrangements for bail. He admitted having suffered a felony conviction for residential burglary in 2000³ and another criminal offense as a juvenile.

Rebuttal

Cynthia A. was S.S.’s high school teacher who saw her every school day. She testified that S.S. never dressed inappropriately and wore a T-shirt and jeans to school every day. She described S.S. as very bright, reserved, quiet, intelligent, honest and not a troublemaker. She did not consider her to be vivacious, assertive, bubbly or silly.

³ Brewer was convicted of burglary in 2000 relating to two other victims in the same prosecution as that involving M.K. and C.C. He was sentenced to prison and, according to the probation report, discharged on January 29, 2006.

Closing Argument

In her closing argument, the prosecutor argued that the jury should consider the evidence of the uncharged acts involving M.K. and C.C. as evidence of Brewer's intent to commit the current crimes. The prosecutor argued that the jury could conclude from that evidence that Brewer had a disposition to commit forcible sex offenses.

In response to this argument, defense counsel argued that M.K. and C.C.'s testimony was just an attempt by the prosecutor to make up for the lack of evidence that Brewer had committed the charged crimes. Counsel argued that the purpose of the testimony was simply to "throw dirt onto Mr. Brewer by causing you to believe that he was the person responsible for the offenses against [M.K. and C.C.] when he was not." Counsel pointed out that the prosecutor never asked C.C. if Brewer was her attacker because the prosecutor knew, and C.C. testified, that she never saw her attacker's face and never identified anyone as the perpetrator.

In rebuttal, the prosecutor argued that defense counsel could have asked questions about the prior trial when the prosecutor in that trial took the stand and then argued, "[b]ut the fact is that -- the defense doesn't want you to know what happened in the prior trial. Defense doesn't want you to know about the evidence from the prior trial." The trial court sustained defense counsel's objection to this argument as improper.

The prosecutor then argued that the prior crimes involving M.K. and C.C. only needed to be proved by a preponderance of the evidence and not beyond a reasonable doubt as defense counsel's argument implied. The prosecutor continued, "And if the People did have the burden to prove those crimes beyond a reasonable doubt, you would have had all the witnesses that were available to the People in those cases. [¶] You would have had the apartment manager who identified the defendant that [C.C.] referred to who had seen him." Defense counsel objected on the ground that the prosecutor was improperly arguing facts outside the record. The court overruled the objection. Defense counsel moved for a mistrial which the court denied.

The prosecutor concluded her argument by apparently pointing to a partially completed puzzle with the image of a Golden Retriever and said, “Ladies and Gentlemen, the defendant is a dog.”

Procedural History

An information charged Brewer with forcible rape (count 1) (Pen. Code, § 261, subd. (a)(2)),⁴ forcible oral copulation (count 2) (§ 288a, subd. (c)(2)), sexual penetration with a foreign object (count 3) (§ 289, subd. (a)(1)), and kidnapping to commit rape (count 4) (§ 209, subd. (b)(1)). As to all counts the information alleged that Brewer kidnapped S.S. and that the movement substantially increased the risk of harm to her beyond that necessarily inherent in the crime of rape. (§ 667.61, subds. (a) & (d).) The information further alleged that he had suffered three prior convictions, a “strike” conviction for residential burglary (§§ 459, 667, subds. (b) – (i), 1170.12, subd. (a) – (d), 667, subd. (a)(1)) and two other convictions for which he had served prison time. (§§ 496, subd. (a), 667.5, subd. (b).)

The jury convicted him as charged and the court in a bifurcated proceeding found true the prior conviction allegations.

Brewer moved for new trial, requesting the court to order DNA testing of the blood evidence collected from M.K.’s clothing and linens in 1997. He also moved for new trial on the ground of prosecutorial misconduct in closing argument. The court denied his motion for new trial and sentenced him to an aggregate term of 62 years to life in state prison. This appeal followed.

DISCUSSION

Error

Brewer contends the expert testimony regarding child sexual abuse accommodation syndrome and rape trauma syndrome was irrelevant and should not have been admitted. The Attorney General concedes the point and we agree.

⁴ Further unmarked statutory references are to the Penal Code.

Brewer next contends the court abused its discretion by admitting evidence of uncharged sex crimes under Evidence Code section 1108 and Evidence Code section 1101, subdivision (b). We agree that the court erred in admitting evidence of the assault involving C.C. The error was prejudicial and requires reversal of the judgment.

Evidence Code section 1101, subdivision (b) makes admissible other crimes evidence when offered to prove, among other things, a defendant's intent in committing the charged crimes. Evidence Code section 1108, subdivision (a) allows evidence of a defendant's uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1009.) This so-called "propensity" evidence to commit sex crimes is admissible under Evidence Code section 1108 provided it is not inadmissible under Evidence Code section 352.⁵

We review the court's ruling under Evidence Code section 352 for abuse of discretion.⁶ (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) If the evidence has no probative value it is, of course, an abuse of discretion to admit it.

C.C.'s testimony that she was attacked by someone she could not identify had no probative value in the absence of evidence that Brewer was her attacker. No evidence of Brewer's connection to C.C.'s attack, however, was offered or admitted. Instead, the court erroneously admitted evidence of C.C.'s jury voting 10 to 2 for guilt and allowed the prosecutor to argue facts outside the record identifying Brewer as the attacker.

Evidence of a hung jury's numerical split is not admissible to prove that the person charged committed the crime. (Cf. *People v. Griffin* (1967) 66 Cal.2d 459, 466

⁵ Evidence Code section 1108, subdivision (a) provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

⁶ Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[evidence of an *acquittal* is admissible to rebut the prosecution's evidence of the defendant's guilt of another crime]; *People v. Mullens* (2004) 119 Cal.App.4th 648, 669 [it was error not to admit evidence that the defendant was *acquitted* of a previously charged sex crime based on the same incident].) That improperly admitted information, however, invited the jury to speculate that Brewer was guilty of the attack, reasoning that the evidence in the earlier trial must have been strong because it convinced 10 of the jurors of Brewer's guilt.⁷

The effect of these evidentiary errors was exacerbated by the court's rulings and the prosecutor's misconduct during her rebuttal argument. To rebut defense counsel's argument that Brewer had not committed the crimes against C.C. the prosecutor argued, "if the People did have the burden to prove those crimes beyond a reasonable doubt, you would have had all the witnesses that were available to the People in those cases. [¶] You would have had the apartment manager who identified the defendant that [C.C.] referred to who had seen him." Defense counsel objected on the ground that the prosecutor was improperly arguing facts outside the record. The court overruled the objection.

The objection, however, should have been sustained. The record contains no evidence that C.C.'s apartment manager had identified Brewer as C.C.'s attacker. Indeed, the Attorney General acknowledges that the prosecutor presented no such evidence, and thus properly concedes that the prosecutor's argument constituted misconduct. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 827-828 [a prosecutor commits misconduct by referring to matters outside the record in closing argument]; *People v. Pinholster* (1992) 1 Cal.4th 865, 948 [referring to matters outside the record in closing argument is misconduct].)

⁷ We need not decide whether admission of M.K.'s testimony regarding the uncharged assault against her constituted error in light of our conclusion that the errors with respect to the attack against C.C. were prejudicial and require reversal of the judgment.

Prejudice

After a review of the entire record, we are convinced that the errors concerning the C.C. incident resulted in a miscarriage of justice and that there is a reasonable probability that Brewer would have achieved a more favorable result in the absence of the errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Alcala* (1992) 4 Cal.4th 742, 790-791 [error in the admission or exclusion of evidence following an exercise of discretion under Evidence Code section 352 is tested for prejudice under the *Watson* harmless error standard].)

Whether the sex acts were consensual was the sole disputed issue at trial. Brewer testified that all the acts were consensual. S.S. testified that they were not. No independent evidence corroborated either Brewer's or S.S.'s version of the acts as either consensual or nonconsensual. The sexual assault exam showed that S.S. sustained injuries to her vagina and posterior fourchette as a result of blunt force trauma but the doctor who analyzed the photos of her injuries testified that such injuries were equally consistent with consensual and nonconsensual sex.

The entire prosecution case rested on the relative credibility of the two principal witnesses. The jury's ability to fairly weigh their testimony, however, was impaired by the court's admission of irrelevant, inflammatory, and misleading evidence concerning the attack on C.C., and the prosecutor's misconduct in arguing outside the record that Brewer was the assailant. We conclude that the errors were prejudicial and will reverse.⁸

⁸ Because we reverse on the ground that the evidentiary errors and prosecutorial misconduct involving the uncharged assault against C.C. were prejudicial and require reversal, we need not reach the issues whether admission of Dr. Schulman's testimony regarding S.S.'s sexual assault examination was inadmissible hearsay or violated his Sixth Amendment right of confrontation. We likewise need not decide whether it was error to admit expert testimony regarding adolescents as risk takers or whether the prosecutor committed misconduct in closing argument by referring to Brewer as a "dog."

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.